Supreme Court of the United States

October Term 1942

No.

AMTORG TRADING CORPORATION, a corporation, VSESOJUZNOJE OBJEDINENIJE "STANKOIMPORT" (All-Union Combine "Stankoimport"), VSESOJUZNOJE OBJEDINENIJE "MACHINOIMPORT" (All-Union Combine "Machinoimport"), VSESOJUZNOJE OBJEDINENIJE "TECHNOPROMIMPORT" (All-Union Combine "Technopromimport"), VSESOJUZNOJE OBJEDINENIJE "RAZNOIMPORT" (All-Union Combine "Raznoimport"), and VSESOJUZNOJE OBJEDINENIJE "PROMSYRIOIMPORT" (All-Union Combine "Promsyrioimport"),

Petitioners-(Libellants-Appellees),

against

AMERICAN FOREIGN STEAMSHIP CORPORATION, a corporation, Claimant of the American Steamship WILDWOOD, Official No. 219356, her engines, boilers, tackle, apparel, furniture and consumable stores, and NATIONAL SURETY CORPORATION, a corporation,

Respondents-(Respondents-Appellants).

BRIEF IN SUPPORT OF PETITION

POINT I

The unwarranted extension by the present decision of the principles of frustration of contracts in time of war as defined by this Court in *The Kronprinzessin Cecilie* and *The Styria* raises a question of primary importance in maritime commerce.

The decision of the Circuit Court of Appeals is professedly based on the above mentioned decisions.

In *The Kronprinzessin Cecilie,* 244 U. S. 12, this Court held that the master of a German vessel at the beginning of the last World War, bound from New York to a British port, was entitled to turn back, on learning that war between Great Britain and Germany was imminent. When the voyage was abandoned war had been declared by Austria against Serbia; Germany had declined a proposal for a conference of ambassadors in London and had sent an ultimatum to Russia; the naval forces of both Germany and Great Britain were being concentrated and business had been practically suspended on the London Stock Exchange. The vessel had sailed in time of peace and turned back in time of war at a point in her voyage when proceeding further would have so exhausted her fuel that turning back would have been impossible. The vessel was a German vessel, subject to forfeiture, and had on board 667 Germans and 406 Austrians who might have been subject to removal and internment in England. The Court on the analogy of contracts for personal service excused by death or the prevalence of cholera in a place where work was undertaken, held that the master was justified in returning.

In *The Styria,* 186 U. S. 1, this Court held that an Austrian steamship which had loaded a cargo of sulphur at an Italian port to be delivered in New York was justified in discharging the sulphur at the port of lading on the outbreak of the Spanish-American war, sulphur being contraband cargo. The vessel in proceeding to New York which had become a belligerent port after the loading, would have been obliged to proceed through the Straits of Gibraltar and along the Spanish coast with the result that she would probably have been seized and her cargo confiscated. As the enemy destination and the nature of the cargo was

known to the master, the vessel also might have been subject to forfeiture. No prepaid freight, so far as appears, had been collected on the cargo and the vessel was carrying other cargo, not contraband, whose owners had a right to demand that the vessel proceed. The vessel was also under engagement to pick up a perishable cargo at Palermo which would have spoiled if not loaded.

The Court held in these circumstances that the master in the interest of all concerned was justified in electing to discharge the cargo in order that he might proceed on the voyage.

Neither of the above mentioned decisions would justify the turning back of a *neutral* vessel bound to a *neutral port* in any of the situations described under Questions numbered 1a, 1b or 1c in the Petition.

All these questions should be considered with reference to a voyage toward Petropavlovsk, the port for which the vessel was bound and from which voyage she was recalled, although on the findings of fact made by both courts the result should have been the same if the voyage were to be considered as one toward Vladivostok.

As to Question 1a:

The damages to the cargo owner from turning back consisted not only of the loss of prepaid freight and return freight to the place of delivery exacted by the respondent but also the cost of storing and reforwarding. The District Court found that these actual outlays amounted to $385,000 (p. 173). These damages were neither contingent nor conjectural.

The damage to the shipowner even in the remote event of diversion of the vessel and confiscation of the cargo would have consisted only of possible delay to the vessel. The limit of such damages as estimated by the owner itself in demanding a bond amounted to only $250,000 (R. 1466, 1489). On the other hand, the shipowner profited by the turning back because of his retention of prepaid freight and the collection of additional freight on the return voyage.

Neither Court found that there was any danger of condemnation of the vessel and the record does not indicate any instance during this war of the confiscation of a neutral vessel by the British for carrying contraband to a neutral port.

The Circuit Court of Appeals did not question the finding of the District Court that:

> "The SELENGA and MAYAKOVSKY were seized for contraband and for inspection of the cargo in the same manner that vessels were detained on the Atlantic and Mediterranean" (p. 189).

The suggestion in the opinion of the Circuit Court of Appeals that the vessel might have been liable to the cargo owner for confiscation of the cargo, if it took place, is wholly without foundation in law. The vessel was bound with lawful cargo to a neutral port; there is no proof or intimation in the record of any ultimate enemy destination and therefore nothing on which to base a finding that the cargo ever would be condemned, and even if it had been condemned on account of such putative destination, no blame could attach to an innocent shipowner. The cargo interests, moreover, were themselves urging the

vessel to proceed and naturally could not recover damages resulting from that course of action.

The actual damage necessarily sustained through the vessel's turning back and the collection by the shipowner of additional charges therefore exceeded any probable damage that would have been sustained by the shipowner had the vessel actually been detained; while the shipowner profited by the abandonment.

Par. 165 of *Restatement of the Law of Contracts* (Am. Law Inst.) dealing with impossibility as a defense, provides in part as follows:

> "In holding whether a promisor's failure to begin or to continue performance is reasonable under the rule of Subsection 1 consideration is given to * * * (b) the extent of physical or pecuniary harm or loss to himself or to others likely to be incurred by attempting performance as compared with harmful consequences likely to be caused to the promisee by nonperformance."

The Circuit Court of Appeals gave no weight whatsoever to this consideration; considered only the risk to the shipowner; and wholly misapprehended the principles of the two Supreme Court cases above mentioned where the probable loss to the vessel and disinterested cargo exceeded many times any pecuniary loss to the libellants from failure to proceed with the voyage.

As to Question 1b:

The master facts are that after the WILDWOOD sailed a single vessel was intercepted in the vicinity of the Straits forming the approach to the Sea of Japan and Vladivostok

and more than a thousand miles from Petropavlovsk, and that there was no interference with commerce to Petropavlovsk at any time.

The decisions both in THE KRONPRINZESSIN CECILIE and THE STYRIA were based on a change in the nature of the voyage owing to the outbreak or imminent outbreak of war in the course of the venture. In *The Styria* the Court said (p. 14):

> "The ship made no contract to carry contraband of war to the port of a belligerent and should not be held to the obligations of a contract into which she has never entered."

In *The Kronprinzessin Cecilie,* the Court said, page 22:

> "The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine* v. *Jane, Aleyn,* 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money,) some, at least, which, if they had been dealt with, *it cannot be believed that the contractee would have demanded or the contractor would have assumed.*" (Italics ours.)

In referring to the judgment of the master as to the danger the Court said, page 23:

> "It was the opinion very generally acted upon by German shipowners."

In the present case the contract from the beginning was one made in time of war to carry cargo to a neutral port which would be contraband only if bound ultimately to a belligerent destination. There was no change in the nature

of the contract and the facts are precisely contrary to those indicated in THE KRONPRINZESSIN CECILIE with respect to the attitude of other masters and shipowners. So far as the record shows THE WILDWOOD *was the only vessel that turned back.*

If the Circuit Court of Appeals is to be regarded as having given any consideration at all to the risk of proceeding to Petropavlovsk, as distinguished from that of proceeding to Vladivostok, its decision goes to the length of holding that *any appreciable or imaginary aggravation of risk* occurring during the course of a voyage justifies its abandonment.

This doctrine was rejected both in *W. R. Grace & Co.* v. *Luckenbach S.S. Co.*, 267 Fed. 676, 680 (C. C. A. 4), where it was held that the outbreak of war and the possible danger of capture or destruction by German warships on a voyage from Chili to New York at the beginning of the last war did not justify the shipowner in refusing to perform, and, in the language of *The George J. Goulandris,* 36 Fed. Supp. 827, 834, where it was held that the outbreak of war must be accompanied by "actual and substantial" dangers and not those in the category of rumor in order to justify rescission.

As to Question 1c:

In THE STYRIA stress was laid on the independent position of the master as the representative of both cargo and vessel in an emergency.

The Court quoting the opinion of the District Judge said (p. 9):

> "The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo and must endeavor to hold the balance evenly between ship and cargo when their interests conflict."

In the present case the master did not even know why the voyage had been discontinued by the shipowner. The latter acted alone and solely in its own interest.

No justification can therefore be found in THE STYRIA for the present decision which must rest solely on the doctrine of commercial impossibility.

It is believed that this is the only case which has arisen in this country involving frustration by war conditions of a voyage between neutral ports where physical danger to life or property was not involved.

Both THE KRONPRINZESSIN CECILE and THE STYRIA involved voyages to belligerent ports, were regarded as close cases at the time they were decided. In both cases at least one of the lower courts differed from this court. If now the long accepted principles of those decisions are to be recast so as to embrace the situations above outlined and the limits of the doctrine of frustration of contracts of ocean carriage are to be relocated, such a step, involving as it does questions of fundamental importance in the maritime law, should at least have the consideration and approval of this Court.

POINT II

The Court in holding that the increase during the voyage of the risk of proceeding to *Vladivostok* excused the vessel from proceeding to *Petropavlovsk* and frustrated both the first and second legs of the agreed voyage, contravened principles established by decisions of this Court and in the Second Circuit.

The District Court found as follows:

> "It was the duty of the vessel to deliver the cargo at Petropavlovsk unless there was a change in the 'World War' conditions which increased the hazards to the WILDWOOD of both ship and cargo to a degree which would have deterred a prudent sailor from proceeding. While there were no such increased hazards as to the port of Vladivostok, a diversion of the ship to Petropavlovsk even lessened any danger as it 'took the ship further North' and away from any port of danger" (p. 204).

The Circuit Court of Appeals made no specific finding as to the possible risk in proceeding to *Petropavlovsk* and it is obvious from the opinion that it was chiefly concerned with its view of the risk of proceeding to *Vladivostok*, 1350 miles to the southwest. It said (p. 2133):

> "On March 15 British naval vessels had seized the neutral Russian steamer MAYAKOVSKY also with a cargo of copper bullion on a voyage from San Francisco also to *Vladivostok* via Petropavlovsk while that steamer was in the North Pacific some 400 miles off Tsugaro Strait and taken the vessel to Hongkong some 1700 miles from Vladivostok * * *."

* * *

At page 2139:

> In considering *de novo* the question whether the news of the MAYAKOVSKY warranted the inference of an increased hazard over that contemplated by the carrier on March 18, before it was known to it, we thus have the shipper's own estimate that when the voyage was abandoned *the port of Vladivostok was blockaded.*
>
> As stated, we cannot find that prior to the MAYAKOVSKY's seizure there was evidence that *the hazard in the voyage to Vladivostok* amounted to running a blockade or anything approaching it.
>
> Assuming that the word 'blockade' is at all applicable to the port of Vladivostok, the action of the British in seizing the SELENGA off Formosa in the channel approaching Vladivostok some 1700 miles distant to the South of that port is at most but a partial blockade. It is such a partial blockade which is the risk assumed by the carrier. It seems clear that it is more than doubling the hazard of that partial blockade to have a hovering of British naval vessels 1800 miles northerly from Formosa on the great sailing circle from the United States leading from the Northeast to Tsugaro Strait, *the normal channel or approach to Vladivostok from the Northeast and but 500 miles distant from that port. It is such an increase of hazard as would require the carrier to exercise the powers given it under Clause 4 and give it the right to turn the* WILDWOOD *away from this newly threatened danger.*" (Italics ours.)

The Court then summarized its findings in the passage above quoted (p. 9 of the Petition) stating that "the carrier had a reasonable apprehension of a real danger of the seizure of the WILDWOOD by the British naval vessels *on her voyage to Vladivostok via Petropavlovsk.*"

The real concern of the news analysts, whose speculations form the principal basis of the decision, is thus expressed in a quotation in the Findings of the District Court (193) from a London radio broadcast:

> "For weeks the British have been worried about war materials reaching *Vladivostok* from American ports. They have believed that such material was designed for Germany by way of the Trans-Siberian Railway."

The shipowner, even if the vessel could not have proceeded to Vladivostok, could have discharged the whole cargo at Petropavlovsk, retaining or collecting the freight. This would have been complete performance of the contract if there was good ground for not undertaking the Vladivostok leg of the voyage. *Aktieselskabet Olivebank* v. *Dansk Svovlayre Fabrik* (1919), 2 K. B. 162 (C. A.), 88 L. J. (N. S.) K. B. 745.

This Court has held that where one of the alternatives of a contract becomes impossible, the promisor nevertheless is bound to render the alternative performance which remains possible.

In *Yankton Sioux Tribe of Indians* v. *United States*, 272 U. S. 351, the Government had undertaken, in the alternative, that the question of the title of the complainant tribe to a certain parcel of land should either be referred to the court for determination or, in default of that being done, should be vested in the Indians. One of such alternatives became impossible but this Court held that the Government was required to perform the other, saying:

> "Granted the impossibility of the first alternative, the Government, nevertheless, took the risk

> and must in accordance with its definite undertaking to that effect, suffer the stipulated consequence in virtue of the principle that where promises are in the alternative the fact that one of them is at the time or subsequently becomes impossible of performance does not, at least, without more, relieve the promisor from performing the other" (p. 358).

In *P. N. Gray & Co.* v. *Cavaliotis,* 276 Fed. Rep. 565 (aff. 293 Fed. 1018, C. C. A. 2), it was held that where a seller had agreed to export certain materials from Canada but had the privilege "of shipping from the New York refinery", an embargo on exports from Canada did not excuse performance. The Court said (p. 571):

> "This clause rendered inoperative any defense concerning the embargo because where rendered impossible to perform in one place by action of the Government nevertheless it was possible to perform in the other. It was only where both alternatives are rendered impossible that a legitimate defense could be predicated upon an embargo."

In Restatement of the Law (Am. Law. Inst., Contracts, p. 872), the commentator said:

> "Unlike temporary impossibility, impossibility of performing part of a promise rarely discharges a promisor beyond the extent of the impossibility."

The decision in the present case to the contrary deals with a matter of importance to maritime commerce and is at variance with the general law of contracts as recognized by this Court and the Circuit Court of Appeals for the Second Circuit.

POINT III

This decision involves the effect of the provisions of the Carriage of Goods by Sea Act and the Harter Act on the frustration clause now in common use in bills of lading.

Clause 4 of the bill of lading and the applicable statutes are quoted in the Petition (pp. 15, 16). The now common use of the clause is there indicated.

In *Scrutton on Charter Parties and Bills of Lading* (14th Ed. 1939) the author in commenting on a clause reading as follows:

> "Should hostilities render it unsafe for the steamer or her cargo to proceed to the port of destination she has liberty to discharge her cargo at any near available port and there end her voyage giving shippers due notice of such fact."

said:

> "It is possible that in cases to which the Carriage of Goods by Sea Act 1924 applies such clauses as these appearing in a bill of lading would be voided by Article 3, Rule 8 of the Schedule Rules."

The Rule referred to is the same as that quoted above, page 15, from our own Carriage of Goods by Sea Act.

The clause here involved departs from the carrier's statutory obligation much further than that referred to by Scrutton since it provides that the criterion for abandonment is the *judgment of the carrier as to possible delay or disadvantage to it* and not the absolute danger of proceeding.

The almost universal adoption by shipowners of Clause 4 or its equivalent has made the question of its validity under the Harter Act and Carriage of Goods by Sea Act a matter of general importance and interest in maritime trade. The apparent incompatibility of the clause and the statutes should be resolved by this Court.

POINT IV

The decision below presents a conflict between the decisions of the Ninth Circuit and those of the Second Circuit as to the extent of the review of facts on an Admiralty appeal.

In trying the issues *de novo* the Circuit Court of Appeals gave no weight to the quality of the testimony of leading witnesses who appeared in the District Court. In giving the appeal the scope of a trial *de novo* the Circuit Court of Appeals proceeded upon a selection of facts to substantiate its determination, which excluded or disregarded the findings below and the emphasis placed on them by the District Court. The Court disregarded the conclusions of the District Court as to the credibility of witnesses who sought to justify the diversion on three wholly inconsistent grounds. It moreover wholly disregarded the findings of the District Court as to the difference in risk between a voyage to Petropavlovsk and a voyage to Vladivostok and based its decision on the supposed risk of the latter.

Inter alia, the Circuit Court of Appeals dealt with the question of the damage to the cargo.

After the Court below had found that there was no proof of the seaworthiness of the vessel, a requisite of the respondent's case if it intended to claim that water had

entered through the hatches (*The Edward I. Morrison,* 153 U. S. 199, 215) the Circuit Court of Appeals *without any evidence as to the adequacy, fitness or condition of the hatch coverings or general seaworthiness at the beginning of the voyage* held that the vessel was excused from liability, making the assumption that the water entered through the hatches in stormy weather. This would be no defense in the absence of the evidence which the District Court found did not exist. The Circuit Court of Appeals therefore completely ignored the findings of the District Court which coincided with the findings of the surveyor employed by the vessel as to the cause of the damage [586-8] without any attempt to justify such procedure or to point out any errors below.

Since the adoption by this Court of Admiralty Rule 46½ requiring findings of fact and conclusions of law by the District Court in Admiralty there has been a sharp divergence in view between the Ninth Circuit and the Second Circuit with respect to the nature of an admiralty appeal. Both courts have considered the question elaborately,—the Ninth Circuit in *The Ernest H. Meyer,* 84 F. (2d) 496, 500; and the Second Circuit in *Petterson Lighterage & Towing Corp.* v. *N. Y. Central R. R. Co.,* 126 F. (2d) 992 (C. C. A. 2). They have reached differing conclusions on the question whether or not the scope of the Admiralty appeal is now analogous to that of an appeal at law or in equity as defined, in Rule 52(a) of the U. S. Civil Rules of Procedure which provides that "findings of fact shall not be set aside unless clearly erroneous."

In the present case the Circuit Court of Appeals reaffirmed and applied (p. 2138) the rule of *The Ernest H. Meyer* after the decision by the Second Circuit in the *Petterson* case and proceeded to weigh the evidence and make

its own findings of fact, both with respect to the claim for frustration and the claim for cargo damage. As to the latter the findings of the District Court [205-6] were entirely superseded.

In *The Ernest H. Meyer* the Circuit Court of Appeals for the Ninth Circuit quoted with approval as the basis of its own views the rule in *The Lucille,* 19 Wall. 73, where this Court said:

> "'An appeal in admiralty has the effect to supercede and vacate the decree from which it is taken. A new trial, completely and entirely if necessary, or, if asked for, is contemplated,—a trial in which the judgment of the court below is regarded as though it had never been rendered'" (p. 74).

The opinion proceeds as follows:

> "It is arguable that the Court" [referring to this Court in its decision in *McCrea* v. *U. S.*] "means * * * that by the promulgation of Rule 46½ requiring findings, the Supreme Court has converted the admiralty appeal into a proceeding in effect as on writ of error.
>
> * * *
>
> "* * * Until in this or some other case the Supreme Court shall clear up the doubt, we therefore adhere to the rule as stated in *The Andrea F. Luckenbach* (C. C. A.) 78 F. (2d) 827, 828, as follows: 'The well-established rule is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence'.
>
> "In so weighing the evidence it is not weighed with the end in view of determining whether a part of the evidence warrants an inference supporting

the finding. We must weigh *the whole evidence.*" (Italics those of the C. C. A. 9th Circuit.)

* * *

"In such weighing of the evidence we are required to make our independent 'examination, thought and judgment' just as did the Supreme Court in The Ariadne, 13 Wall. 475, 479, 20 L. Ed. 542, one of the last Supreme Court cases before the Act of 1875 abolishing trials de novo in admiralty appeals."

* * *

In *Petterson's Lighterage & Towing Corp.* v. *N. Y. Central Railroad Co.*, 126 F. (2d) 992 (C. C. A. 2) (1942), Judge Learned Hand said:

"We are not entirely clear that the Ninth Circuit in the Ernest H. Meyer, 84 F. (2d) 496 meant to hold that upon admiralty appeals it had a broader power than it has under Rule 52 (a), Federal Rules of Civil Procedure; but if so, we cannot agree. Much confusion has arisen, as we apprehend it, from the varying language which judges have used to describe what has now become the rubric of Rule 52 (a). As we have said, the decisions are myriad in which findings of the district court have been in fact treated as final, but the locutions have varied by which the courts have described how far they thought themselves limited. We have gathered a number of these in the appendix annexed to this opinion; and an examination of them at once shows that they differ only in form from the phrase, 'clearly erroneous,' of Rule 52 (a) * * *" (p. 995).

* * *

"* * * When therefore in 1930 the Supreme Court promulgated Rule 46½, it did no more than recog-

> nize an already thoroughly well established growth in customary law, for which it merely provided a means of better realization. It would now be as revolutionary to disregard this shift in admiralty as it would be in equity. Moreover, not much of any practical importance survives of the doctrine that an appeal in admiralty is a new trial'' (p. 996).

Both decisions recognize the desirability of a definite statement of the present law.

If practice in the Circuits is to be uniform it remains for this Court to determine whether the review on an admiralty appeal may now fairly be defined in the terms of Rule 52½ or whether the proceedings in the District Court are merely a more or less futile preliminary to the re-examination and restatement of both facts and law by the Circuit Court of Appeals.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted to enable this Court to review the decision of the Circuit Court of Appeals.

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Dated: New York, N. Y., May 5th, 1943.

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